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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 296

OTIS EVANS, TRADING AS OTIS EVANS TRUCK LINE,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO AFFIRM FILED BY APPELLEES

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The appellant, pursuant to Rule 7, Paragraph 3, of the Rules of the Supreme Court of the United States, moves that the motion to affirm filed by the appellees be overruled and that this case be set for hearing on its merits.

This is a direct appeal from the final decree dated March 30, 1946, of a specially constituted district court of three

judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission.

The Commission's order, dated March 29, 1945, denied appellant's application for a certificate as a motor carrier under the "grandfather clause" of Section 206 (a) of the Interstate Commerce Act as amended (49 U. S. C. 306 (a).

The issue arising on this appeal is whether the Commission's order is supported by substantial evidence, and it is submitted by the appellant that the Commission's order was not supported by substantial evidence and the District Court's order is erroneous.

The appellant further submits that the motion to affirm should be overruled because the appeal does present a substantial question and the only way that this Court can determine whether or not the evidence presented to the Commission was insufficient to justify the Commission in granting the appellant a certificate is for the case to be heard on its merits.

History

The history of the application before the Interstate Commerce Commission is fully set forth by the District Court in its opinion, designated as "appendix" to the statement as to jurisdiction filed in this cause. Appellant, for brevity, adopts this statement of the District Court as the history of the case, with the exception of the statement of the District Court with reference to the overruling of the appellant's petition to the entire Commission for a review of the decision of Division Five and states that the Court correctly stated this portion of the history but appellant desires to enlarge on this portion of said statement, as will appear later in this brief.

Evidence

The original application filed by appellant and subsequent amended applications included a large number of specific commodities to be transported in certain designated territories. When this case was argued before the three-judge special court at Lynchburg on March 14, 1946, appellant by counsel, although not conceding the correctness of the Commission's conclusions, admitted that the determination by the Commission of his rights as to the transportation of numerous commodities between various shipping points was final and not reviewable by the Court and thereupon withdrew all claims asserted in the petition filed in the District Court except his claims for authority to transport:

> "*New Furniture*
>
> "From Stoneville, North Carolina, to New York, New York, Oxford and Philadelphia, Pennsylvania, East Rutherford and Camden, New Jersey.
>
> "*Wool in Bales or Bags, Wool Waste and Clippings, Wool Yarn in Bales and Wool Floss*
>
> "From Philadelphia, Manayunk, and Bridgeport, Pennsylvania, and Camden, New Jersey, to Leaksville and Spray, North Carolina.
>
> "*Wool in Bags or Bales, Greased and Scoured*
>
> "From Philadelphia to Spray and Leaksville, North Carolina."

Therefore, the only question to be determined on this appeal is whether or not the Commission's order as to the commodities above named between said shipping points is supported by substantial evidence or that its action in denying the appellant a certificate covering the above com-

modities between the said shipping points was arbitrary or without evidence to support it.

New Furniture

The evidence submitted in support of the appellant's rights to transport this commodity between the points set forth above consists of affidavits of shippers, bills of lading or freight receipts and the testimony of witnesses at the two formal hearings, the first at Winston-Salem, North Carolina, on April 28 and 29, 1943, before Examiner McCaslin and the second at Winston-Salem, North Carolina, before Examiner Yardley, on November 4, 1943. At the second hearing, there was no testimony for the appellant and neither was there any testimony introduced by the protestants with reference to the new furniture between the points mentioned herein. Division Five, in its report and recommended order, which was subsequently adopted by the full Commission, and the order of the full Commission likewise was affirmed by the District Court, eliminates new furniture between the shipping points then and now requested because out of a total of 88 bills of lading that were exhibited, covering shipments from Stoneville, North Carolina, to northern points from the year 1934 through the year 1939, 31 bore the following stamp:

> "This shipment is tendered and received subject to the terms and conditions of the company's uniform bill of lading effective June 15, 1941.
> Shipper's signature. Agent's signature."

A list of these bills of lading was filed with the testimony of the appellant and is marked "Exhibit No. 1." All of the bills which bore this stamp were on shipments moving from Stoneville, North Carolina, to Brooklyn, New York, and Oxford, Pennsylvania. The bills of lading indicating

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shipments to other points did not bear this stamp. By reference, however, to "Exhibit No. 1," it will be noted that the number of bills of lading bearing the stamp was small in comparison with the bills that did not bear the stamp and there was abundant evidence to show that the appellant was engaged in the transportation of furniture from Stoneville, North Carolina, to the points indicated, prior to June 1, 1935, and continuously thereafter, the bills bearing the stamp eliminated. The appellant could not explain how or why this stamp appeared on the bills of lading. He denied any knowledge of the transaction and, unfortunately, the bills were assembled by Mr. Dickerson, his bookkeeper, who testified at the first hearing and was excused before any question was raised as to these bills of lading and could not be located at the time of the second hearing due to the fact that he was a member of the Armed Forces of the United States, holding a captain's commission. The attorney, Mr. Floyd Osborne, who also assisted in the preparation of the list and the assembling of the bills of lading, was a member of the Armed Forces of the United States and he could not be produced as a witness. Appellant says that the Commission was in error to disregard these bills of lading that bore the stamp because an examination of same will show that the dates of the bills of lading were filled in in the handwriting of the person signing same, namely Miss B. Hopper; that the same color of lead appears through each of the bills; that there were no alterations or erasures appearing thereon. To substantiate the bills of lading which bore the stamp, Mr. R. S. Foley, Manager of the Stoneville Furniture Company, Stoneville, North Carolina (Tr. 106), was called as a witness and he identified the person signing the bills as Miss Hopper and testified that the signature appeared to be hers. He

further testified as follows, supporting appellant's application to transport new furniture (Tr. 107):

By Mr. Estes:

"Q. What company are you connected with?

"The Witness: Stoneville Furniture Company, Stoneville, North Carolina.

By Mr. Price:

"Q. How long have you been with that company?

"A. Since September 3, 1933.

"Q. Have you had charge of the office and manufacturing end all during this period of time?

"A. Yes.

"Q. I will ask you before I go into these bills of lading, has Mr. Evans been hauling furniture for you from Stoneville, North Carolina, to points in Philadelphia, New York and northern points, and northern points and eastern points since 1934?

"A. Since March, 1934.

"Q. Was he hauling through 1934, 1935 and 1936, along through there?

"A. Yes, sir.

(Tr. 109)

"Q. Mr. Foley, here is one bearing date 10-23-34, Oxford, Pennsylvania, and from that time until now Mr. Evans has been hauling new furniture for Stoneville Furniture Company?

"A. Yes.

"Q. Hauling it to northern and eastern points?

"A. Yes, sir."

In addition to the bills of lading shown on the list identified as "Exhibit No. 1," the applicant, now appellant, filed a list of bills of lading which is attached to the petition filed with the Commission on January 5, 1942, requesting the Commission to reopen, reconsider and vacate the certifi-

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cate issued April 28, 1941 (certified record beginning at page 30. The lists referred to begin at page 85 of the certified record.) The shipments on these lists, which were exhibited to the District Supervisor, Mr. Raymond, apparently show 98 additional shipments of new furniture that moved to the northern points mentioned above from Stoneville, North Carolina, that were not considered by Division Five in its report and not referred to in the opinion of the District Court. Division Five in its report also apparently overlooked the list filed as "Exhibit No. 1," covering shipments from Stoneville, North Carolina, to Brooklyn, New York, Philadelphia, Pennsylvania, Oxford, Pennsylvania, and East Rutherford, New Jersey, beginning with the year 1940 through December 19, 1942. This list, a part of "Exhibit No. 1," was filed to show the continuity of the operation. The list shows that there were 112 shipments moving from Stoneville, North Carolina, to Brooklyn, New York, 104 shipments from Stoneville to Philadelphia, Pennsylvania, 32 shipments from Stoneville to Oxford, Pennsylvania, and 50 shipments from Stoneville to Newark, New Jersey.

Wool in Bags or Bales, Greased and Scoured

From Philadelphia to Spray and Leaksville, North Carolina.

Wool in Bales or Bags, Wool Waste and Clippings, Wool Yarn in Bales and Wool Floss

From Philadelphia, Manayunk, and Bridgeport, Pennsylvania, and Camden, New Jersey, to Leaksville and Spray, North Carolina.

The Commission, adopting the report of Division Five, eliminates these commodities apparently on the theory that there was only documentary proof of this operation to

1939, when in fact exhibit 19 (page 132 of the certified record) plainly shows movements through 1942, or up to the date of the first hearing. Exhibit 15 (page 124 of the certified record), exhibit 16 (page 128 of the certified record) and exhibit 19 (page 132 of the certified record) show a list of shipments of these commodities from 1934 through 1942 between the points set forth above and, in addition thereto, the list filed with the District Supervisor at Charlotte shows movements of these commodities in the requested territory from 1934 to the date of the conference (pages 68 and 69 of the certified record).

In addition to the bills of lading, there were a number of affidavits filed and received by the Commission and also supported by the testimony of Captain Dickerson (T. 30). Captain Dickerson was an employee of Marshall Field and Company, in charge of the Karasten Rug Mill, at Leaksville, North Carolina, and had also been connected with the Bedspread Mill of Leaksville. At the second hearing, Mr. Sheffield, an employee of Marshall Field and Company, at Spray, North Carolina, testified that the appellant did not transport wool from northern points to the mill with which he was connected (Tr. 149). Attention is directed to the testimony of the witness Sheffield, as it will appear that his evidence is not in any way contradictory of the testimony of the appellant, his witnesses or the bills of lading filed in support of his application. The appellant did not produce any proof, nor has he ever contended that he transported wool, etc., to or for Marshall Field and Company, of Spray, North Carolina. The records examined by Mr. Sheffield were the records of Marshall Field and Company, Spray, North Carolina, and not the records of the Bedspread Mill, Leaksville Woolen Mills or Karasten Rug Mill. It is confusing because the towns of Leaksville and Spray are very close together and the Bedspread Mill and the Karasten

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Rug Mill at Leaksville are subsidiaries of Marshall Field and Company. Captain G. C. Dickerson testified (Tr. 27-30) that he was an employee of Marshall Field and Company from 1934 to the date that he entered the service of the United States and had charge of the Bedspread Mill and Karasten Rug Mill and he also had a connection with the Leaksville Woolen Mill; that the applicant, appellant, moved wool, wool waste, yarn and floss from northern points to these mills from 1934 through 1941.

Legal Principles Involved

The appellant is conscious of the narrow issue here presented and the proper scope of judicial review of the Commission's orders. In the case of *Interstate Commerce Commission* v. *Union Pacific Railway Company,* 220 U. S. 541, 547 (1912), the Supreme Court there stated the general principle that orders of the Interstate Commerce Commission should not be set aside by the court if they are within the Commission's statutory powers and are supported by substantial evidence. Also, in the case of the *United States* v. *Carolina Freight Carriers Corporation,* 315 U. S. 475, 484, 490, this Court held that it is the function of the Commission and not of the court to pass upon the weight and credibility of the evidence. An applicant for a motor carrier certificate under the "grandfather clause" has the burden of establishing the existence of the facts entitling him to the certificates sought. *Alton Railway Company* v. *United States,* 315 U. S. 15, 25 (1942).

Argument

The Commission in this case, and also the District Court, has denied the appellant all of the operating rights sought under the authority of the "grandfather clause" of Section 206(a) of the Interstate Commerce Act as amended.

The pertinent language of the "grandfather clause" applicable to this case is as follows:

> "• • • *Provided, however,* That subject to section 210, if any such carrier • • • was in bona fide operation as a motor carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, • • • the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect. • • •"

It is undisputed that appellant filed a timely application for a certificate under the "grandfather clause" and submitted affidavits of certain shippers, etc., and later presented bills of lading to the District Supervisor for inspection and filed with the District Supervisor a list of the bills of lading showing shipments of the commodities that had been transported in the territory wherein operating rights were being sought. Without going into all of the steps followed by the appellant, it is deemed sufficient for the purpose herein to mention the fact that the applicant, appellant, at the time that he first started transporting commodities by motor vehicle from Stoneville, North Carolina, to northern points, did not keep a proper record of the shipments transported by him as he, like other carriers at the time, did not think it necessary. The bills of lading submitted in support of his operating rights were supposed only to be representative and not to include, by any means, or cover the volume of the movements of freight. The applicant, appellant, is without education and can do very little more than write his name and he had to depend upon

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others to assemble the bills of lading, shippers' receipts, etc., in order to support his application. It is submitted that the evidence in this case, as a whole, plainly shows that the applicant was in bona fide operation as a common carrier of special commodities on June 1, 1935, and continuously thereafter until the time of the first hearing in this case, at which time the evidence was closed. The evidence shows that the applicant, appellant, held himself out as a common carrier over irregular routes and continuously solicited business. However, it does appear that he was overly ambitious in his request for transportation rights and did not present sufficient proof to enable him to obtain all of the authority sought.

It is conceded that evidence, in the form of bills of lading, was presented in connection with shipments to Elkin, North Carolina, and Mounty Airy, North Carolina, which made it evident that he was not entitled to authority to transport new furniture from Mount Airy, North Carolina, or to transport wool from northern points to Elkin, North Carolina. The spurious evidence introduced in the form of certain bills of lading in connection with the operations to these points has resulted in the Commission's disregarding all other evidence presented and caused it to enter an order denying to the applicant, appellant, all of the operating rights sought. It is submitted that the Commission would have been amply justified in refusing to consider any of the evidence introduced if this had been an application for a certificate of public convenience and necessity requiring not only proof of the need for the operation but of the fitness of the applicant to conduct such operation. The fitness of the applicant to conduct an operation under the "grandfather clause" is not considered, but the *sole question is whether or not the applicant was in bona fide operation on June 1, 1935, and continuously thereafter.*

The Commission completely disregarded all of the documentary evidence introduced as evidence by appellant as to the transportation of furniture and wool in the territory wherein operating rights were sought when four witnesses other than appellant, namely: C. F. Wells, employee of Stoneville Furniture Company (Tr. 47), W. D. Bondurant (Tr. 57), Curtis W. Evans (Tr. 59) and R. S. Foley, Manager of Stoneville Furniture Company (Tr. 107), testified positively that the applicant transported furniture from Stoneville, North Carolina, to the points mentioned herein from 1934 continuously to the date of the first hearing, and there was absolutely no evidence to the contrary other than the bills of lading that bore the stamp mentioned on page four of this brief. It appears to the appellant that it is inconceivable for anyone to think that he would have produced bills of lading in support of operating rights that had been altered in order to bring same within the critical period when the bills so altered bore a stamp which could not have been in existence prior to 1941. The stamp is very noticeable and could have been seen by anyone handling the bills of lading. It is, therefore, submitted that the action of the Commission in rejecting all of appellant's evidence introduced, supporting the transportation of new furniture, was arbitrary and that the order denying all operating rights was not based on any evidence or upon substantial evidence.

Wool, Etc.

In addition to bills of lading that were filed in support of the appellant's application to transport this commodity from northern points heretofore designated to Leaksville and Spray, North Carolina, he also submitted the affidavits of H. A. Morson, Manager of Leaksville Woolen Mills, not connected with Marshall Field and Company, the testimony of Captain G. C. Dickerson (Tr. 27) and the testimony of

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James A. Taylor (Tr. 42), all of which show that the applicant was engaged in the transporation of wool from Northern points to the Karasten and Bedspread Mills, also Leaksville Woolen Mills, from 1934 continuously to the date of the first hearing at Winston-Salem. The appellant, in his testimony (Tr. 91), emphatically stated that he had hauled wool from 1934 continuously to the date of the first hearing for himself and not for others.

It is, therefore, submitted that the action of the Commission in denying the appellant authority to transport wool, etc., from northern points to Leaksville and Spray, North Carolina, was arbitrary and based entirely upon the fact that applicant, in his ignorance, signed an affidavit before the District Supervisor Raymond at Charlotte on the 6th day of March, 1939, wherein it appeared that he may have been hauling wool for other carriers in 1934 and 1935.

The overwhelming weight of the evidence introduced shows that the appellant was engaged in the transportation of new furniture north and wool, etc., south on June 1, 1935, and continuously thereafter.

Wherefore, the appellant respectfully submits that the motion to affirm filed by appellees should be overruled and this case set for hearing by the Court on its merits.

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